UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NIKE, INC.,

Plaintiff,

v. 22 Civ. 983 (VEC)

STOCKX, LLC,

Conference

Defendant.

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New York, N.Y.
March 4, 2025
10:30 a.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

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(Case called; appearances noted)

THE COURT: Okay. Here's what I'm going to do. I'm going to start with some very specific questions, and I want very specific answers. Then I'll tell you what my, sort of, 10,000-foot issue with the case is, and then I'm going to give you the floor.

I'm not controlling your argument, but I just want to make sure that we're all on the same page.

So let me start with Nike. So, Nike is seeking summary judgment as to false advertising claims with respect to the authenticity claims only; correct?

MS. DUVDEVANI: A subset of them, your Honor; that's correct.

THE COURT: Okay. And your theory of falsity is predicated solely on literal falsely; correct?

MS. DUVDEVANI: For the purposes of this summary judgment motion, yes, your Honor.

THE COURT: Okay. And your theory of materiality is that you're entitled to a presumption of materiality because the authenticity claims involve an inherent or material quality of StockX's product; is that correct?

MS. DUVDEVANI: That is not correct, your Honor.

We do not believe that we're afforded a presumption.

THE COURT: Okay. So was there evidence that you gave me? What are you relying on? The complaints?

MS. DUVDEVANI: Yes, your Honor.

So, essentially, there is evidence, and there is also the law that we're relying on.

We do believe that the Second Circuit is clear that when a false advertisement pertains to inherent quality or characteristics of a product -- here, the authenticity or providence of a Nike shoe -- that that is sufficient to establish that that would be material, i.e., likely to influence the purchasing public.

However, we have also put before the Court a plethora of evidence establishing that those claims, indeed, is likely to influence the purchasing public in the form of StockX's own internal surveys commissioned before this lawsuit ever began.

THE COURT: Got it. I got it.

MS. DUVDEVANI: Okay.

THE COURT: All right. StockX, you're seeking summary judgment as to both the authenticity claims and authentication process claims; correct?

MS. BANNIGAN: For slightly different reasons, but yes, your Honor.

THE COURT: Understood.

You argue that authentication process claims are neither literally false nor impliedly false; correct?

MS. BANNIGAN: Yes, your Honor.

THE COURT: Your claim that the authentication process

claims are not impliedly false rely, in part, on the fact that Nike has hot presented extrinsic evidence that consumers actually understood the statements to convey a misleading message, and Nike does not have evidence that StockX deliberately and egregiously intended to deceive the consumers; is that correct?

MS. BANNIGAN: As to implied falsity, Yes, your Honor.

THE COURT: Correct.

And you argue that neither set of claims are material because Nike has no evidence that the claims were likely to influence purchasing decisions and because you have an expert who says they're not material; correct?

MS. BANNIGAN: That's part of the reason, yes.

We believe Nike hasn't presented evidence. We have the expert testimony. We have expert testimony from Ms. Butler and Dr. Vigil, and customer testimony, your Honor.

THE COURT: Okay. All right. Thank you.

Let me just start with what my 10,000-foot problem is.

The parties have separated the claims into authentication claims and process claims, but I'm supposed to look at this as a whole, and a lot of times, those two statements are right together. So, I'm having real difficulties with the way you have teed this up for decision at the summary judgment revel. Because a reasonable juror could see this very different from how you guys are separating it.

So that's my 10,000-foot observation.

So, who moved first? I don't know. You both moved. Who wants to argue first?

Nike, it's your product, and you've got all these Nike shoes, so I feel like you get to talk first.

MS. DUVDEVANI: Thank you, your Honor.

They're actually not Nike shoes, which is part of the problem.

THE COURT: They're just boxes?

Oh, they're fake Nike shoes.

MS. DUVDEVANI: Yes.

Should I take the podium?

THE COURT: Please.

MS. DUVDEVANI: So I think that I appreciate what the Court just noted regarding this dissection of the claims, and I do want to clarify that when Nike moved for summary judgment, it moved on some very specific claims that it has accused of false advertising: 100 percent authentic; one hundred percent verified authentic; guaranteed authenticity, every item every time; always verified authentic, and; always authentic, never fake.

And I think a good place to stat, your Honor --

THE COURT: I'm sorry, but aren't those going to squ-- -- is it necessarily, if the jury is trying to figure that out, they're going to be looking at their process?

MS. DUVDEVANI: Yes, your Honor.

THE COURT: Okay.

MS. DUVDEVANI: And the reason I think that it would be a good place to start is, I think that the Gestalt of your question is an issue of context, that all of these claims, essentially, appeared together, so how are we supposed to look at them?

And I think there's been a few disputes between the parties -- both factually and legally -- not surprisingly, and one of the disputes when it relates to falsity relates to what is the proper context when you're looking at a claim. And this is not the first case that you have multiple claims on the same page together and multiple claims asserted.

I did have, to the extent the Court thinks it's helpful, some blow-ups at the context that we're looking at, so if I may.

THE COURT: Sure. A little hard to look at on the single page.

MS. DUVDEVANI: Yeah.

So, look, Nike's position is that context is not just one word; it's not just one claim, but it is the entirety of the advertisement. And as the Court says in *J.R.*, you can't have so much context that it completely swallows up the message. It needs to be reasonable. The Court in that case, as well as *Apotex*, has pointed out, for example, that the

sophistication of the consumer is not the proper context, which is something that StockX has tried to argue with their Wells expert.

So let's talk about context. First and foremost, you are a StockX consumer. You go on to the StockX website. You're looking for a pair of, perhaps, Nike Panda Dunks. This is the landing page that you see. And you have the name, Nike Dunk Low, the beautiful stock image of a Nike Dunk, and then right above it, you have a button that says, one hundred percent authentic. This is what the consumer sees.

Now, if the consumer is curious what one hundred percent authentic means, because it's not plain and unambiguous -- which Nike believes that it is -- it leads to that and can then click on that hyperlink, and it takes you to the StockX authenticity page where they explain all about what one hundred percent authentic means.

And this is the context of that page. And as you can see, almost all the rest of the claims that we've moved on, and, indeed, all of what StockX has called the process claims that they have moved on appear on this page providing context for one another, essentially. And you see it says, guaranteed authenticity, every item, every time. Shop on StockX with complete confidence, knowing every purchase is one hundred percent verified authentic.

And as you go down the page, you can see some of the

other claims at issue. For example, a final check in our authentication practice, our QA experts ensure that nothing slips through the cracks.

And you can go further down, and I will point out that the one context that seems to be very important for StockX is the context related to this, how they've calculated 99.96 percent, which I'll be happy to talk about momentarily. That is this -- I had to take a magnifying glass out -- tiny little smallest font possible that talks about weighted return data.

If you click on big facts here, which is StockX authentication by the numbers, it then takes you to the big facts page that talks about all the things that StockX does to stop counterfeits and ensure that your product is one hundred percent authentic. And you see here, it says, always verified authentic since 2016. That's the banner.

You also see that -- it was hard to capture in the exhibit, but there was this kind of animated graphic on the top of the landing page that I just showed you that also rotates and says, always verified authentic.

And finally, there is an article that you can get to by navigating the StockX website that has the title: StockX always authentic, never fake, which is that last claim that Nike has moved on. And you can see in the parties' lengthy statement of facts we thought you'd come out and yell at us

about --

THE COURT: Consider yourself yelled at.

MS. DUVDEVANI: -- that you know, there's a lot of fighting over this context.

We wanted to give the Court the whole context. This is the context of the article. I believe that StockX points out, as evidence that this is ambiguous down here where it says, as a result of our authentication process, less than point-three percent of customers are ever unhappy. I don't really know what that has to do with authentication, but that's something that they've pointed out.

So this is the context of the claims. Now, I don't think that the Court has a problem with being able to determine that one hundred percent authentic, always authentic, guaranteed authenticity, in the context of these claims, is still literally false, because the Court, using its reasonable, practical behind -- as its permitted to do under the law -- can look at this and say that it presents a clear and unambiguous message that when you receive a pair of Jordan One Retro High Bred patent leather shoes from StockX with a receipt that says, new one hundred percent authentic and even a green StockX tag on it that says, always verified authentic, after this context, that that consumer is going to believe that that they have a one hundred percent authentic Nike shoe that they're holding in their hands. In fact, this is a counterfeit. This is one of

the four counterfeits that Nike found StockX selling that started this whole adventure, your Honor.

We don't think that there's any reasonable dispute that these claims are literally false. We don't think that they are not plain and unambiguous. We believe that StockX's arguments as to why a consumer might believe that this means, no, no, no; this says that we do our best to make it right, and if we slip up, we give you a refund. That is --

THE COURT: Or, we try really hard, and we're really pretty good at this.

MS. DUVDEVANI: Exactly.

And that doesn't show anywhere.

And in fact, your Honor, one -- again, going back to the context of the authenticity landing pages, the only thing that this page says regarding refunds is, can I return my item after I've received it? Due to the anonymous nature of our market, we are unavailable to offer returns or exchanges.

And when you look through the StockX documents that we provided to the Court, you see that is absolutely true. They make is almost impossible for consumers to get refounds of their products, even when they complain that those products are counterfeit.

That brings me to that 99.96 claim, which we believe is also -- even though we didn't move on it, StockX did, and we also believe, just like we have the burden not to establish

beyond a reasonable doubt that that was false but that we've established a *prima facie* case that it's literally false, and we believe we have, because when you look at that substantiation, this is what StockX says. StockX says, essentially, that 99.96 percent accuracy rate is really just a rate of refunds. So a consumer has to be smarter than all of their expert authenticators, receive this fairly realistic-looking Nike shoe; believe that something's wrong with it; chase StockX over and over, and over again, just like Mr. Kim did, three different times before he never got a response, so he just created a viral post that went viral, in part, as a result of this litigation; then get StockX to respond to you; send them pictures; get them to agree with you that there might be a problem; get them to agree to have you send them back, and; then you get a refund. That's the nominator. That is the amount of consumers that get through to StockX divided by all of the products they've ever sold in that year. That's how they come up with a 99.96 percent guarantee, and we believe that that is a literally false claim.

Just to take another example, and this does go -- I know there's been a lot of sealing in this case, so I don't --

THE COURT: There's been a lot of --

MS. DUVDEVANI: Sealing.

There's a lot of confidential information. I do want to take about one aspect of it.

THE COURT: Check with your adversary to see if this is under seal. If the case goes to trial, it's all going to be out.

MS. DUVDEVANI: Okay.

(Counsel conferred)

MS. DUVDEVANI: Your Honor, another claim that they moved on in terms of the authentication process claims that they argue that Nike hasn't met its burden on is the 100-plus data points. And you'll see in the documents that there's fights of, we have evidence that there's only 20 -- and they told internally, or there's 75 or 57, and their argument is, essentially, there's a hundred plus data points -- even assuming that they are right that you can count to one hundred or one hundred plus, when you look at their standard operating procedures for authentication, I just want to take the Court through some those of those one hundred-plus data points to snow, again, that Nike's established a prima facie case that these claims are literally false.

Here's step 1: grab one speaker box from authentication rack and place on workstation. That is not a data point. Step 8, here's another one: remove sneakers from sneaker box and place sneakers, outsole down on workstation. Step 9, if sneaker box is not already closed, close sneaker box. That's step 9 data point. Step 10, grab sneaker box and place under black light. Step 13, place sneaker box back on to

workstation. Step 15, open speaker box. Step 19 --

THE COURT: They're doing a lot of opening and closing of the sneaker box.

MS. DUVDEVANI: They do, and each one is, apparently, its separate data point. And that's my problem, your Honor.

I'll stop there, before I get --

THE COURT: I think you made your point now.

MS. DUVDEVANI: So, you know, I won't want to waste the Court's time today, but if you look in our briefing over and over again at these claims, they all suffer these similar infirmities, that when you really take a close look, there is a lot of literal falsity there, and we would say that for the claims we moved on. It's just unequivocal. You see it in the case law.

I have yet to see a case from this district or this circuit or any other circuit where authenticity is determined not to be literally false when counterfeits are being sold by a party, which moves me into materiality, and it's the same argument there.

I don't know of a single case, whether it's, *you know, Chanel v. The RealReal* -- even though it was a Rule 12 motion -- or the other cases that we've cited in our briefing where a claim about what a consumer is getting, the actual providence or the nature of a good isn't found to be material.

And as I noted to the Court, we don't think about it

in terms of a presumption. Nike has never argued that if you prove literal falsity and you've proven inherent quality or characteristics, that equals a presumption. Those two elements of materiality and literal falsity equals a presumption that you don't need a consumer deception survey like you would in the cases of implied falsity claims.

And it just so happens that every case I've seen that involves an inherent quality or characteristic of a product does find it to be material, but I don't really think it says, as a matter of law, which is why I say that it's not a presumption. But you see this, time and time again, where those are the sorts of claims where they are found to be material, even without more evidence.

You know, *Merck Eprova v. Gnosis S.P.A.* notes the very nature of what a manufacturer is selling is an inherent quality of that product. *Pom Wonderful v. Purely Juice*, out of the Central District of California, same thing, advertising that something was one hundred percent pomegranate juice when it wasn't was material.

CJ Products v. Snuggly Plushez, the As Seen On TV snuggly pillow case, out of the Eastern District of New York, just the fact that it said, As Seen On TV showed that that was a material claim consumers thought it was something they saw on TV, when it wasn't.

Same thing with the *Merck* case, *Merck v. Brookstone*

Pharmaceutical, where the Court really makes an interesting point in that case, Judge Sullivan notes that Acella's practice of changing its labels to reflect those of Metafolin-containing products reveals that Acella believed or at least consumer perception was a fundamental characteristic of the product as well.

And that's the point. I think that the case law gets a little bit confused with the word "inherent" as part of something, but when you really look at the cases in the case law, it means something that's essential, the heart of the product.

You see that in the NBA case, which was a Second Circuit case, but I really liked the way Judge Preska described it at the district court level when she said, look, the heart and soul of this score output technology is accurate scores. Whether or not they come from the arena or whether it's somebody sitting at home in front of a computer, that's just minutia. And you see that in a lot of different cases making that differentiation when it comes to materiality.

Same thing with the *Medisim* case that StockX cites, although StockX cites it for a proposition that, actually, it doesn't say. StockX claims that *Medisim* holds that a consumer perception survey or consumer testimony is required to show materiality. I do want to note, that case does not say that. No case says that. It says you need some evidence of likely

materiality; right?

Now, *Medisim*, again, that was a case that was, essentially, mainly a patent case, but the allegedly-false advertising claim there was, rapidly tracks heat flow for thermometers. But if you're a mother that has a kid with a kid that has a fever, you want to know if your thermometer accurately tell the temperature, not accurately tracks heat flow.

As you look through these cases, you see that's the real meaning of materiality. Now, whether or not StockX is right under *Reed*, that Judge Oetken -- he bifurcated the standard to say, likely to influence is the second part of inherent quality or characteristic. We haven't seen another case in the circuit do that, either before or after *Reed*, but presupposing that they're correct that we would need to show additional evidence, we have done that in spades, your Honor.

There are consumers, after consumers, after consumers that are complaining about receiving fake products. If they didn't care about the fact that a product was authentic or not authentic, they wouldn't be complaining. As I noted at the beginning of the day, StockX has its own internal surveys. They like to do surveys, even before this lawsuit was filed, and all of them, one after the other, point out how very material and how very important these authentication claims are to their consumer.

We even see it in the case of Mr. Kim. StockX points to his deposition testimony that he doesn't care. The next paragraph said that he does care about authentication.

And frankly, even though we don't think that Ms. Butler is properly before the Court as a rebuttal damages expert, even her survey notes a fairly significant percentage of consumers who care about whether the shoe is authentic, and of course they do.

A shoe that costs $628.44 is a shoe that a consumer is going to care if it's authentic or not, which is why StockX also says over, and over, and over again in its internal materials and to consumers that authenticity is its core value proposition to consumers. It is the reason they were founded in the first place. So for them to now disclaim it and say, consumers don't really care about whether or not the $628 Jordan they buy is actually a Jordan, I don't think, respectfully, it has much credibility.

Turning briefly to injury, there is some presumption when it comes to injury. The Court has made clear that where parties are obvious competitors, injury can be presumed. This is another fight that the parties have, where StockX's position is, because Nike is a primary retailer and they operate on the secondary market that there's no competitive injury. We respectfully disagree with that. We believe that our expert, Dr. Stec, that the Court cited in the *Daubert* motion, showed

that at any given time, there are dozens of the same -- not just shoes, but the exact same Nike shoes and Nike shoe styles being sold on both websites at the exact same time.

You see in *Dependable Auto Sales*, which StockX tried to use to support their position, that you needed comparative advertising to have that type of presumption, but StockX ignored the original decision that was handed down in that case. That was a decision on reconsideration on a damages issue for trial.

That initial decision pointed out, like all the cases in the circuit point out, that you can get a presumption either if there is comparative advertising or if you can establish obvious competition. We believe that we've established obvious competition for the reason that in *Dependable Sales*, there was no obvious competition. There, it was a lead-generating service versus a bunch of car dealers. Here, you have two parties that sell, supposedly, brand new one hundred percent authentic Nike shoes on the internet to consumers.

To make matters worse, your Honor, sometimes those shoes offered for StockX under retail price, and they even have a button touting that sometimes it's under retail price. Sometimes they offer Nike shoes before even Nike has released those shoes.

They intentionally use beautiful stock imagery, as I pointed out to the Court earlier, and, of course, they also say

that each shoe is one hundred percent authentic, so when a consumer has a choice, who is not going to chose the one that's the cheaper version of the exact same shoe?

We've also pointed out reputational harm, and this is something that was picked up in the *Chanel* case as well -- and the case where, I believe, the judgment was just handed down yesterday on liability for false advertising by the Court -- *Chanel* did not move on summary judgment, but defendant did, and when the Court denied it, he said that the brand manager for *Chanel* pointing out that when someone is told that something is an authentic *Chanel* bag and it falls apart, that is going to have reputational harm on the company.

And that's the exact same situation that we have here. We have evidence is -- there's -- the evidence in the report is replete with StockX consumers complaining both to StockX and to Nike about bad quality Nike shoes that we were assured from StockX were real.

We even have that tied in a bow. I don't know if you want me to talk about the Joe Pallet evidence that you did not want Ms. Kammel to testify on but you left open for trial, if I could touch on that momentarily.

THE COURT: Sure. I want you to wrap up, though, in the next five.

MS. DUVDEVANI: Sure; that's fine.

I know your Court saw fit to exclude that from *Daubert*

and from Ms. Kammel's testimony, and I appreciate that. I will just briefly say that the reason that we didn't talk about those shoes in our interrogatory response that StockX pointed out is because for our interrogatory response on what we base our counterfeiting count on we were really trying to avoid evidentiary issues, so we only based it on a physical pairs of Nike shoes that we had.

However, as you know from the evidence and the sealed evidence in particular, Nike does not need a physical pair of shoes to determine the authenticity of a product. So when it came to our harm argument, which really was more of an expert argument, what Mr Pallet, the head of brand protection at Nike, did is what he did previously and what he was deposed extensively on already, previously.

He looked at the images that Mr. Malekzadeh, a StockX power buyer, had. He scanned the QR code. He was able to determine, through Nike's proprietary technology, that three pairs of those imaged shoes were counterfeit. But there were the emails of this StockX consumer saying, this is falling apart. There's a problem with these shoes. These shoes are off.

And again, if we want to talk about context, from the time he bought them from the time he was complaining, StockX was telling him, no, no, no. No red flags. These are one hundred percent authentic shoes. You have nothing to worry

about.

So to wrap up, your Honor, we do believe that Nike has established what it needed on its own summary judgment motion to have the Court grant on the claims that we moved on. We also believe that we've made at least a *prima facie* case on the claims that StockX has moved on.

And unless the Court has any questions, I'll thank you for your time.

THE COURT: I just have one.

If I don't accept your literal falsity argument, if I'm persuaded that there's just enough going on that a reasonable consumer could see it as StockX wants them to see it, am I correct that there's no evidence in the record of a consumer survey or something else to show that a substantial number of consumers were misled?

MS. DUVDEVANI: Not that we put in, your Honor, but we do believe that we don't need it under the case law, and we believe there is plenty evidence -- which is why we moved on wilfulness on false advertising -- that StockX intentionally deceived consumers with these claims. That is sufficient for us to be granted summary judgment or to win at trial on implied falsity as well.

THE COURT: All right. Thank you.

MS. DUVDEVANI: Thank you, your Honor.

Ms. Bannigan.

MS. BANNIGAN: Yes, your Honor.

Thank you.

So we do tend to agree with your Honor that there are a lot of issues in this case. We also apologize for the number of exhibits that we have provided to the Court. What we have tried to do with our summary judgment motion, recognizing that this case is going to trial one way or the other -- there's the whole NFT issue. There's other advertising claims neither party moved on.

THE COURT: I thought the NFT thing had fallen away.

MS. BANNIGAN: Unfortunately not, your Honor.

THE COURT: Literally, it's still in the case?

MS. BANNIGAN: It's still in the case; yes, your Honor.

THE COURT: Is that right?

MS. DUVDEVANI: It is, technically.

THE COURT: Who cares about NFTs anymore?

That was so 2020.

MS. DUVDEVANI: This is an ongoing conversation, your Honor.

THE COURT: Okay.

MS. BANNIGAN: I don't think I've been part of that, but, yes.

Anyway, we know this is a case that's going to trial. We don't need to talk abut NFTs, but we did look for discrete

issues and discrete claims where we thought -- our strong view is, there are no genuine issues of material fact when you look at these claims. A lot of our arguments do overlap, so I'll attempt to address both of them now.

Ms. Duvdevani and I agree on the standard for literal falsity, which is that the claim must be unambiguous; there must be only one meaning and one reasonable interpretation, so no juror can look at these claims and have any other interpretation.

Nike, of course, argues that the interpretation of the authenticity claims, some of which we've seen on the demonstrative -- I will say, I'm not sure if it's my eyes, because I couldn't really see them up close on the demonstrative, but it does show the text of the whole website. They have argued that there's one meaning and that StockX only sells authentic non-counterfeit products. And to succeed on this claim, obviously, the idea is that no reasonable juror could see otherwise. We just don't believe that that's the case.

When you look at the context here, and the context is not just the authenticity page; the context is not just the pages where you go and buy the product. We agree context is not everything. There has to be a limit to what the context is, but it's certainly the entire website here.

THE COURT: Is it really? Really?

So a consumer goes to the first page, the lovely first page with the stock photo of the zebra or the panada -- or whatever the hell it's called -- shoe, and it says, guaranteed authentic Nike shoe, are we really saying that consumers have to click on hyperlinks to know what a hundred percent authentic means?

MS. BANNIGAN: So, I don't think that the zebra shoe is the homepage of the webpage. That's -- my understanding is, that's where you would go if you're looking for whatever the shoe is called.

THE COURT: What's the name of the shoe? It's some kind of an animal; right?

MS. DUVDEVANI: It's a Panada Dunk, your Honor.

THE COURT: Panada.

MS. BANNIGAN: Thank you, your Honor.

THE COURT: Panda what?

MS. DUVDEVANI: It's because it's black and white. It's a Nike Dunk that's been called the Panda Dunk.

THE COURT: I wear Adidas.

MS. BANNIGAN: So do I, your Honor.

You won't be surprised.

THE COURT: And, to be clear, I've just realized after this case, I've looked at it and I thought: This isn't even an authentic Adidas shoe. I look at the picture of Stan Smith, and it's really bad. But I didn't buy it from StockX, to be

clear; it's not a StockX shoe.

Like, one hundred percent, so if I knew what a Panada Dunk shoe was and I was looking for it, and I went either just to my Google search and did -- because I had heard of StockX and I knew that it was a cheaper way of buying authentic shoes -- and I do StockX Panada Dunk, isn't it going to take me to the page that was blown up?

MS. BANNIGAN: I think there are different pages that -- thank you, Gabby -- that you might get to from a Google search.

But the context here is that you're going to a resale marketplace. If you've heard of StockX, you know that it is a resale marketplace.

THE COURT: Understood.

MS. BANNIGAN: StockX is not actually selling you the shoe. StockX is providing this platform to connect you with a seller. You don't know who the seller is. StockX has worked very hard to make it a safe marketplace it entered, specifically, to make this safe because it's sneakerheads, and they care very much about it being authentic. It's something that StockX cares very much about.

THE COURT: But other people buy on StockX, too; it's not just sneakerheads. It's parents whose kid wants a Panada Dunk and the side size is not available in the local Nike store.

MS. BANNIGAN: So, it was founded for sneakerhead s, but yes, it would not be a fair statement to say it is only sneakerheads -- although I do think the definition of sneakerhead is fluid, but -- everybody who goes to the StockX website knows they are going to a resale marketplace.

And there is context on this website that tells you that what StockX is saying is not that there is no possibly, ever that a counterfeit can get through. What StockX is saying is that their standard is one hundred percent authenticity. They are guaranteeing you to meet that standard. They put all of these processes in place to attempt meet that standard, and they will make it right if they don't.

THE COURT: Okay, but --

MS. BANNIGAN: It's a standard guarantee.

Excuse me, your Honor.

THE COURT: Sorry.

Guaranteed tends to mean, like, if you've got something that that's not it, you can return it.

MS. BANNIGAN: Yes.

THE COURT: But you do not make it easy to return, suggesting that the one hundred percent guaranteed authentic means something else than, we really try hard, and if we mess up, we'll give you your money back, or not; I'm not even sure if it's a money-back guarantee.

MS. BANNIGAN: It's a money-back guarantee, and, in

fact, it comes out of StockX's own pocket, and so they don't get that money back from the seller. StockX takes the hit. And they've done it -- I think the data in the motion shows in 2021 alone, there is at least 10,000 returns.

And so I don't agree with the characterization that StockX doesn't make it easy to return something. StockX has always been clear, and you just need to look at the numbers of people who have returned. Even with these advertising claims, they saw the advertising claims. They reached out to StockX to get a refund, and at least 10,000 times, in 2021 alone, those refunds were given.

And so really, Nike has pointed to ten emails -- it might be ten; it might be 11, something like that --

THE COURT: Well, first they had to open the email, so that was one step; right?

MS. BANNIGAN: I do have a dispute between steps and data points, but I'll get to that point, your Honor. I think there was a disagreement there on what was actually said.

But, you know, as to Mr. Kim, who is the customer at issue here with the 34 counterfeits, he himself has said, one of the reasons I shop on StockX is because their customer service is so good.

Now, of course, there is an unfortunate situation where he sent the email regarding these shoes and it was misfiled and the customer service was not so good, but his

testimony in the face of this is, StockX has great customer service.

Now, there are different ways you can think about this context. So, one, you go to this website and you know that it is a resale marketplace. Everybody knows you cannot be a hundred percent sure of what you're getting, but StockX is a great place because it looks at it and it tries.

THE COURT: I'm not sure that I agree with you that everybody knows that it can't be one hundred percent authentic, because the buyer doesn't know what's going on behind the curtain. For all they know, there's some kind of a deal between StockX and Nike and that Nike has licensed you, or whatever the secret sauce, to make sure you know the difference between a really good counterfeit and an authentic shoe. So the notion that everybody knows, I'm not sure analysis right.

MS. BANNIGAN: Well, let's look at what they do know and what they see and think about whether it's reasonable that a juror could have this interpretation, because I do believe when you look at this evidence it is certainly something that, at the very least, could have two different interpretations, which means it is not literally false.

So at first, it's a resale marketplace. Obviously, I've said that over and over again. StockX's website includes a detailed description of the significant counterfeit problem it's trying to solve and the process that it implements to

solve it. That, of course, is a major reason why StockX was found. The website goes on to explain this process, including that there are human authenticators that are hired by StockX -- not by Nike or by any other brand, but by StockX -- that individually look at each pair of shoes that come through their system.

It's perfectly reasonable that at least one juror could look at this process and understand that it's not foolproof; it is a human process. But the website also includes note, for instance, that -- I know it's contested, but -- the 99.95 or 99.96 percent, the accuracy rate for StockX says that this was calculated by the number of shoes that were returned. So, right off the bat, it is openly admitting that it is wrong sometimes and not one hundred percent of the shoes that customers get are authentic.

But those shoes are one hundred percent guaranteed. And StockX's website also includes a link to terms and conditions on every page, including on all of these pages that are up on those demonstratives, and the terms and conditions specifically say what steps a buyer should take if a buyer receives an item it believes to be counterfeit.

Now, Ms. Duvdevani bought up the *Chanel v. RealReal* case. That was a motion to dismiss opinion by Judge Broderick where Judge Broderick found that these claims should survive. So it's a very different posture here, of course, but one of

the things that Judge Broderick found in that opinion was that terms of service are a relevant place for a resale marketplace to disclose the existence or even the possibility of counterfeit products in its marketplace. And in that case, the RealReal did not have any of this disclosed in its terms of service, and so that counts it against the RealReal.

Now, of course, that was a motion to dismiss, but here it's the complete opposite. We have the terms of service, and the terms of service have always disclosed what a buyer should do if they receive a counterfeit. Those are plain statements that appear on StockX's website, and they contradict the notion that no consumer would see this and believe that StockX could ever make a mistake and that something that's coming through a resale marketplace from third parties could not possibly be counterfeit.

And so it's in this context that it's possible that consumers did interpret the claim as the guarantee, and StockX feels very strongly that they meant the guarantee. They stood by the guarantee, and that's all of the extrinsic evidence. That's not part of the context, but if you look at the extrinsic evidence, it fortifies the fact that consumers did, in fact, understand what StockX meant by it, which was that these are one hundred percent guaranteed.

And so you have the return data, and so if consumers thought they were just out of luck and there was nothing they

could do, why is it that tens of thousands of consumers are actually returning these things and StockX is taking them back?

There's also the evidence with Roy Kim, himself, and Roy Kim testified that he understands that there could be counterfeit that he receives. He's a very frequent buyer from StockX. He's purchased hundreds of shoes, I believe, since this incident happened, and what he testified in his deposition is that when he received this particular batch of shoes, he went and he checked them with third-party authentication -- there's other third-party authentication services out there; I think one is called CheckCheck.

Obviously, he wouldn't have done that if he thought that there's no way that there could possibly be counterfeits passing through. The advertising claims were there on the page when he bought these shoes, yet he's still checking them, because that is the context of a third-party marketplace.

And so they're right that there was no blanket return policy. There's no buyer remorse return policy. There actually is one now, but there wasn't at the time, so if you don't like it, there has to be a problem, but there is a return policy, and there's a lot of data and a lot of evidence showing that StockX accepted these returns and consumers knew about it.

And in fact, even in some of the emails that Nike points to that says consumers were so unhappy and there's been reputational injury, they mention the claims and they say, and

I want a refund. Plaintiff's exhibit 174 or plaintiff's exhibit 168: You said these were going to be one hundred percent authentic and I don't think they are; I want a refund. Like, that is exactly the point of what StockX was trying to get across. They have a standard of a hundred percent authenticity. It is very important to them. Very doing very good things in trying to make this marketplace safer, but they will make it right when they confirm that they make a mistake.

I'll move on to materiality, unless your Honor has any other questions on -- actually, let me just talk for a second about the process claims, which are in here as well, since we're doing the literal falsity.

StockX moved on a discrete set of claims --

THE COURT: Correct.

MS. BANNIGAN: -- that we believe just -- there's no way that they could be literally false, that there's only -- one, they're true, and, two, to the extent -- they're certainly not literally false, and so the claims are proprietary. The evidence is undisputed that we have our own system. We even have a patent on our system, which is in the statement of facts. We don't understand how Nike disputes that our system is proprietary.

The multistep and one hundred-plus data points, what StockX has said is that there are one hundred-plus data points that they look at, and that is absolutely true if you look at

the evidence we cited. We didn't say that there are one hundred steps. We are not counting, open a box, close a box. There are one hundred-plus data points that they look at, and that is in the 56.1 statement in paragraphs 543 to 5533 as well as several key exhibits that are cited there.

We were surprised to get pushback on this one, because it is very clear in the record.

Same with advanced technology --

THE COURT: But you didn't move on literal truth.

MS. BANNIGAN: We moved that StockX -- excuse me.

THE COURT: You didn't cross-move.

MS. BANNIGAN: Our motion is that these claims are not false, so they are not literally false and they are not impliedly false. We argue they're true, so they can't be literally false.

THE COURT: Okay. Go ahead.

MS. BANNIGAN: Again, this was our attempt to -- we thought we were helping everybody out by trying to limit some of what we would talk to at trial. Maybe it's that everything needs to go to the jury, but we do think these are pretty uncontroversial. And to the extent that Nike's claiming they have some kind of different meaning, that means they also would not literally be false, because literally false means there can only be one unambiguous meaning. and so none of these are literally false.

Same with advanced technology, expert authenticators, quality assurance, I don't need to run through this. Our evidence is clear in our brief. It points to our 56.1 statement that there is evidence to back all of this up.

I will address the 99.96 percent authentication accuracy rate. Here, StockX tells consumers that the rate is based on weighted return data compared to total authentications. That is disclosed; it is not literally false. That is disclosed.

THE COURT: It's sort of inscrutable, though.

MS. BANNIGAN: But it's on the website. And it is hard to see in this exhibit and in some of the way it's been copied and pasted into the exhibits, but it's on there. It's on the website.

THE COURT: A copy and paste problem?

MS. BANNIGAN: I didn't mean copy and paste. I mean, some of the exhibits -- I have looked -- that Nike has put in, it is very hard to read. It's not hard to read when you're on the actual website looking at it.

THE COURT: Okay.

MS. BANNIGAN: So we do believe that that is at least one easy way, if we're going to narrow any claims for trial that it's those specific process-related claims.

We understand that there are questions of fact with respect to the authenticity claims, and, you know, I know that

Nike has said that no case has found these claims not to be literally false, but there's actually no case like this that has found on summary judgment that these claims are literally false.

For example, in the *What Goes Around Comes Around* case, my team has been referring to that as WAGACA. I don't know what the correct interpretation is or the pronunciation, like, they didn't move on -- it was the same type of claims at issue, one hundred percent authentic, guaranteed authenticity. Nobody moved on summary judgment, because there's clear questions of fact that a jury needs to debate about what consumers on a resale marketplace understand those claims to be.

In terms of materiality --

THE COURT: I'm also going to ask you to finish up in about the next five minutes.

MS. BANNIGAN: Okay. I'll address materiality and injury as quickly as I can, your Honor. In terms of materiality, it sounds like we're on the same page, that there's no presumption that Nike is entitled to, but the question is, what does inherent quality mean, and is it purely enough just to say this is about an inherent quality and that means it's material.

What the cases have clearly said is that's not enough. It's not necessarily a two-step inquiry that you have to have

an inherent quality and you have that show that it's likely to impact purchasing decisions, but there has to be something more than just an inherent quality. That's what the *Reed Construction* case -- that's the only case. It's a district court case in the Southern District of New York. It's the only case that has addressed this exact question with, is inherent quality enough, or do you need show something more.

There, that case was about -- the Court said, this does go to quality, but it's still not material because there's no evidence that has been presented in the record that it's likely to influence purchasing decisions.

And that's actually the same in all of the cases that Ms. Duvdevani pointed out. There was evidence in there. It wasn't just, this is strict liability; this is about authenticity, so it's obviously material. What the court is saying in these cases is, there has to be an analysis. Why is it likely to impact purchasing decisions? There has to be something more here.

The *Church and Dwight* case, for instance, the Court says, likely to influence purchasing decisions and then says, well, there were lost sales, so if there's lost sales, clearly, somebody cares about this.

The theme through all of this is that there's evidence. We don't believe Nike has put in any evidence of this, and even if they did, we have put forth

counterevidence -- well, maybe there's not a presumption. If there was, we have rebutted that presumption. Essentially, what they're asking for is a presumption because they're saying, well, it's about quality. This is what the product is; therefore it's material.

But here, like your Honor pointed out, we have Ms. Butler's purchase intent survey where she did a survey, one with the claims, one without the claims, and found there is no statistical difference between who is purchasing on the website.

We have Dr. Vigil's analysis, where he looks at both StockX and GOAT -- GOAT is a competitor resale marketplace -- and says, since StockX has taken down these claims, is there any statistical difference between the sales and whether GOAT is getting more of the market share? The answer is no.

And then, of course, there is the consumer, the one customer to testify here, who actually received the counterfeits at issue, Mr. Kim. And he's saying I purchase on StockX because of the customer service, because of the layout, because of the -- there's a host of reasons. And there's just not enough to show -- he does mention, I only purchase on resale platforms that have authentication. That means the process; that doesn't show anything about these specific claims being material. And what we, in fact, have showed is that purchasing doesn't change if the claims are not there.

I'll move over to injury, by your Honor's request that I finish up. On injury, there is just not the support in the cases for this notion that Nike is entitled to a presumption of injury, simply because the parties are competitors.

THE COURT: You agree you're competitors.

MS. BANNIGAN: Absolutely not, your Honor.

I think that's a huge -- my next sentence was going to be, there's a huge question of fact as to whether these parties are competitors, but that's not something that your Honor has to reach here, because if you look at what the cases actually say, going to *Merck Eprova* case and then looking through *Lexmark* and the more recent *Souza* case, the cases are clear that the presumption exists if you're dealing with direct comparative advertising, and that's where I'm saying my competitor's products aren't as good as mine; I'm particularly calling out the competitor. And what the cases say is, there's obvious injury when you have comparative advertising, because you're calling them out and saying their product is not as good. That makes sense.

Merck Eprova said, well, let's look at this. Is it always the case that it has to be comparative advertising? There might be other situations in which it applies. And here, the situation that we have is, this is a two-player market; it's only me and you. And so when I'm saying this claim, obviously, it's directly impacting you, because you're the only

competitor it possibly could impact. Two-player markets are like comparative advertising, and so that should count here. It's the same reasoning.

And so as the *Lexmark* case says, there has to be actual injury. The court considered -- this is the Supreme Court -- the Court considered -- the Lanham Act says likely injury; that's not enough. There has to be an actual injury.

Souza is the Second Circuit case. It's the first case that specifically says, we haven't addressed whether *Lexmark* applies in this context or how we deal with Lexmark in this context and whether -- how it compares to our past precedent in the circuit. It looks at the *Merck Eprova* case and says, this is call consistent with what we've ruled before. To the extent there is comparative advertising, you're dealing with two people, there is a presumption; but when there is not a presumption, when it is not comparative advertising or a two-player market, there has to be actual evidence of injury. And that's a direct quote, actual evidence, and that is not what we have here.

We have evidence of possible diverted sales. As your Honor said, there could have been sales diverted. There is no evidence that any sales were diverted. Nike has not claimed lost profits in this case. There is absolutely no evidence. It could have. There is evidence that it could have put in through an expert. The possibility of lost sales is not

enough, and that's the same with the possibility of reputational harm.

I want to remind the Court that what *Lexmark* says is that the injury has to flow directly from the advertising. And so, even if it is the case that consumers are mad because they have gotten a counterfeit -- which I am not conceding to, but let's assume for the sake of this argument -- there is nothing to say this flows directly from the advertising.

And Ms. Butler's survey shows that it doesn't. The consumer testimony shows that it doesn't. There is just nothing to tie these specific advertising claims to actual injury here, which is what you need to do for false advertising.

THE COURT: Thank you.

MS. BANNIGAN: Thank you, your Honor.

THE COURT: A very short rebuttal.

MS. DUVDEVANI: I'm going to stay right here, your Honor.

THE COURT: Even better.

MS. DUVDEVANI: Super short.

Really quickly, most of Ms. Bannigan's argument on materiality related to consumer sophistication, that is not -- on falsity, rather, that is not supposed to be considered. She talked a lot about who the consumers are, what the consumers would consume. *JR Tobacco v. Davidoff* says that the court is

not supposed to consider the sophistication of the advertising audience, and to reach the delicate balance between the literal text and the context of an advertisement, counter-claim defendants urge embracing as much context as it would require to disclaim the common meaning of the words used in their advertisements, one hundred percent authentic here, and that's what StockX is improperly trying to do now.

In terms of evidence of materiality, StockX doesn't like our evidence of materiality. That doesn't mean it doesn't count. There is not a single case that shows that you need the evidence they're pointing to: consumer testimony and surveys.

Medisim had does not say that, and as noted we have StockX's own admissions, their own internal surveys, their own consumer complaints, and even their own expert, Ms. Butler, determined that it was important. There is no case law that says it has to be the only driving force that it's a likely influencer of purchasing decisions.

Finally, on injury -- and I'll make this very brief -- respectfully, I do not agree with Ms. Bannigan's interpretation of the case law. *Lexmark*, a Supreme Court case about standing, has not changed the fact that it is actual or likely injury in order to get past the liability phase of a false advertising claim.

And in *Souza*, which also says, likely injury, in other words, it can't be speculative. There, there were models that

alleged that being shown on a strip club advertisement was potentially detrimental to their careers. They had nothing to back that up. For all they knew, that was useful to their careers. There was just no evidence one way or another.

That is not what we have here, your Honor. We have plenty of evidence showing injury.

Thank you.

MS. BANNIGAN: Can I be very, very brief, your Honor?

THE COURT: Yes.

MS. BANNIGAN: Thank you.

On the point of literal falsity about sophistication, we are not using customer testimony as part of the context. What we're saying with the customer testimony is that it reaffirms that when you look at the context that is on the actual website, this is how consumers view the website. And so we're not in a disagreement about the law.

But, if you look at the *Avis v. Hertz* case, for instance, there, the court evaluated the context and says that, well, consumer perception actually fortifies that understanding of the context. And so that's what we're talking about here, and the consumer perception certainly does fortify that context.

On materiality, just a quick note about the litigation surveys. Similar to our argument on injury, we have to keep in mind that you have to look at, it's whether the claims, the

advertising claims were material to purchasing decisions. Surveys that do not show consumers the advertising claims do not tell whether the advertising claims are material.

And so that's the issue with the emails that we're pointing to, with the surveys that we're pointing to. They may be talking about the process and the fact that StockX has this process is a very different question, but whether the specific authenticity claims that Nike has moved on are material or have caused injury, that is the question here. And there's is no evidence in this record that any of this is flowing from the advertising claims.

THE COURT: All right. We're going to take a ten-minute break. Don't go far.

MS. BANNIGAN: Thank you, your Honor.

(Recess)

THE COURT: Okay, ladies and gentlemen. I am now ready to rule on the parties' cross-motions for partial summary judgment. Nike's motion is granted to the extent it seeks a judgment that StockX is liable for distributing counterfeit goods with respect to the four pairs of shoes it sold to Nike's investigators and the 33 pairs of shoes it sold to Roy Kim. Nike's motion is denied in all other respects, and StockX's motion is denied in its entirety.

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Summary judgment should be denied where there are genuine issues of material fact 'that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Davis-Garett v. Urb. Outfitters, Inc.*, 921 F.3d 30, 45 (2d Cir. 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Courts must "construe the facts in the light most favorable to the nonmoving party and resolve all ambiguities and draw all reasonable inferences against the movant." *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014).

I will first address Nike's claim that StockX distributed counterfeit goods in violation of the Lanham Act. To establish liability on this claim, Nike "must demonstrate (1) that it has a valid mark that is entitled to protection under the Act and (2) that defendants' actions are likely to cause confusion as to the origin of the mark." *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003). Because the parties do not dispute the validity of Nike's marks, *see 56.1 Statement*, ¶¶ 12-14, Nike is entitled to a presumption that StockX's actions were likely to cause confusion, so long as StockX did, in fact, distribute counterfeits. *See Spin Master Ltd. v. Alan Yuan's Store*, 325 F. Supp. 3d 413, 421 (S.D.N.Y. 2018).

StockX does not dispute that it distributed counterfeit shoes to Roy Kim and to Nike's investigators in the United States. *See StockX Opp.*, Dkt. 296, at 9-10. There is no question of fact that StockX is liable under the Lanham Act with respect to those 34 pairs of shoes.

StockX argues that it cannot be held liable for distributing the three Test Purchase Shoes shipped to, and inspected in, the Netherlands because those sales were not sufficiently connected to U.S. commerce. That's *id.* at 11-12. The Supreme Court recently clarified that liability under the Lanham Act can arise only where "the conduct relevant to the statute's focus occurred in the United States," although this standard may be met "even if other conduct occurred abroad." *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 419 (2023).

The Second Circuit has not yet applied Abitron, but when it has applied the "relevant to the statute's focus" test in other contexts, it has explained that "the focus of a statute is on the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *United States v. Napout*, 963 F.3d 163, 178 (2d Cir. 2020). Here, the conduct the Lanham Act seeks to regulate (the sale and distribution of counterfeit goods) and the party whose interests it seeks to protect (Nike, as the trademark holder) are both based in the

United States. *See* 56.1, ¶¶ 13, 36, 155.

The ultimate destination of the shoes is unrelated either to StockX's conduct or Nike's interest in having its marks protected. Accordingly, StockX is also liable under the Lanham Act for the three pairs of test purchase shoes that were shipped to the Netherlands. StockX's liability as to the shoes its distributed to Michael Malekzadeh is less clear, although certain facts are undisputed. It's undisputed, for example, that when Nike's brand protection specialist examined the Zadeh Kicks facility, she identified and photographed 40 shoeboxes containing shoes with corresponding StockX receipts. 56.1, ¶¶ 200-02. Using Dolos (Nike's internal verification system), she later determined those shoes to be counterfeit. *56.1 Statement*, ¶¶ 200-01.

Moreover, StockX has not refuted that the receipts in each shoebox reflected actual StockX purchases known to have been made by Mr. Malekzadeh and shipped to his business address. *56.1 Statement*, 197, 199.

Nevertheless, there is evidence that creates questions of fact as to whether the shoes are counterfeit and whether they are attributable to StockX. Neither StockX nor any other third-party has corroborated Nike's conclusion that the Malekzadeh shoes were counterfeit. That is relevant because there is some evidence that Dolos may not always be an accurate means of identifying counterfeits, including documented

incidents in which shoes determined to be counterfeit using Dolos were later found to be genuine after an in-person review. See *56.1 Statement*, ¶ 15 (StockX's Response).

Moreover, even assuming the Malekzadeh shoes were counterfeit, there are facts from which a reasonable jury could conclude that the shoes Nike discovered at the Zadeh Kicks facility may not have actually been purchased on StockX. As noted by the receiver appointed to oversee the dissolution of Mr. Malekzadeh's business, "Zadeh Kicks did not have a comprehensive system housing the inventory, nor did it have sophisticated procurement, order processing, fulfillment or shipping procedures." *56.1 Statement*, ¶ 363. Because Zadeh Kicks sold tens of thousands of shoes annually, *56.1 Statement*, ¶ 360, it is possible that Mr. Malekzadeh (intentionally or carelessly) mixed or matched different versions of the same shoes with receipts. A jury may deem that possibility sufficiently likely to conclude Nike has not proven by a preponderance of the evidence that StockX sold the shoes.

Drawing all reasonable inferences in favor of StockX as the nonmovants, the Court concludes that the question of whether the Malekzadeh Shoes were counterfeit and whether they were purchased on StockX must be resolved by a jury.

In addition to liability, Nike seeks summary judgment as to its claim that StockX's counterfeiting was willful. "Summary judgment is not a tool well suited to determining

willfulness, especially when it turns on determinations of credibility, which are within the province of the jury." *Disney Enterprises, Inc. v. Sarelli*, 322 F. Supp. 3d 413, 444 (S.D.N.Y. 2018).

Nike's argument turns entirely on the notion that StockX purposefully ignored warnings that it distributed counterfeits and failed to correct the structural elements of its website that may have been attractive to counterfeiters. StockX maintains that it made extensive efforts to root out counterfeits, including adopting authentication protocols and suspending known sellers of counterfeits. The question of willfulness will require a factfinder to weigh the competing evidence and assess the genuineness of StockX's efforts to address counterfeiting.

Only the jury can make such subjective determinations. Accordingly, Nike's motion for summary judgment as to whether StockX was a willful counterfeiter is denied.

I will now address the false advertising claims. "To prevail on a Lanham Act false advertising claim, a plaintiff must establish that the challenged message is (1) either literally or impliedly false, (2) material, (3) placed in interstate commerce, and (4) the cause of actual or likely injury to the plaintiff." *Church & Dwight Co. v. SPD Swiss Precision Diagnostics*, 843 F.3d 48, 65 (2d Cir. 2016). The parties agree that the Challenged Claims were placed in

interstate commerce. I will discuss the other elements in turn, starting with falsity.

Nike proceeds exclusively on a theory of literal falsity. "To establish literal falsity, a plaintiff must show that the advertisement either makes an express statement that is false or a statement that is false by necessary implication, meaning that the advertisement's words or images, considered in context, necessarily and unambiguously imply a false message." *Church & Dwight*, 843 F.3d at 65. "Only an unambiguous message can be literally false; if the language or graphic is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false." *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 63 (2d Cir. 2016). Additionally, courts must "consider the advertisement in its entirety and not engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately." *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001).

Both parties have engaged in the type of "disputatious dissection" against which the Second Circuit has warned. Nike seeks summary judgment only with respect to the so-called authenticity claims. StockX argues that the falsity of the authenticity claims must be decided by a jury, but it moves affirmatively on falsity grounds with respect to the so-called authentication process claims.

As best as I can discern, the authenticity claims are assertions that StockX only sells authentic products, while the authentication process claims are assertions that StockX has a process for verifying the authenticity of its goods. But the line between the two categories is blurry, because many claims in one category appear side-by-side with claims from the other category. That makes it difficult, if not impossible, to interpret the two categories of claims separately.

To ensure the challenged statements are considered in their full context, I will analyze the ads without reference to the party-created categories.

Nike contends that the ads promise not merely that StockX's authentication process is very effective, but that it's perfect at eliminating counterfeits. There are facts that support Nike's argument. During the relevant time period, every page for every item sold on StockX contained a logo indicating that the relevant product was "100 percent Authentic." *56.1 Statement*, ¶¶ 57-58. That logo then hyperlinked to a webpage that told customers, among other things, to "shop on StockX with complete confidence knowing that every purchase is 100 percent verified authentic," that its quality assurance process guarantees "nothing slips through the cracks," and that its authenticators will catch "every minor detail." *56.1 Statement*, ¶¶ 58, 577, 583. Because a jury could find that those assertions, on their face, falsely

promise a flawless authentication process, the Court concludes, as a matter of law, that Nike's proposed interpretation is reasonable.

StockX, not surprisingly, urges an alternative interpretation. It argues that the advertisements can be read only to communicate that StockX believed, based on its verification and inspection process, that every item sold on its site was authentic, not necessarily that every product was actually non-counterfeit. This interpretation is far less intuitive than Nike's, but StockX presents barely enough evidence to raise a triable issue of fact whether it is a reasonable interpretation of the advertisements.

The most powerful piece of evidence supporting StockX's position is that the hyperlinked webpage on which most of the challenged claims appear represents that StockX's "authenticators maintain a 99.96 percent accuracy rate." *56.1 Statement*, ¶ 576. A reasonable juror might see that as communicating that the authentication process is good but not flawless, but that is, by no means, foregone conclusion. A reasonable juror could also conclude that a customer would assume that "accuracy" is different from authenticity, given that StockX touts its process as 99.96% accurate but its products as 100% authentic.

Customers with a great deal of spare time and an intense interest in parsing advertisement copy can navigate to

an entirely separate webpage, scroll to the bottom, and squint through the fine print for an explanation of how the 99.96% statistic is calculated, but a reasonable juror could also conclude that would just muddy the waters further. That page of explanation notes that the accuracy rate is not a measure of accuracy at all, but rather a calculation of "weighted return data compared to total authentications." *56.1* ¶ 575. Whether a reasonable person would see and understand that disclaimer - and whether it acts as a disclaimer at all - is a question for the jury to decide.

StockX also introduces an expert report from a so-called "sneakerhead," who opines that sneaker collectors would understand the ads to mean only that StockX's shoes are "verified, looked at by someone," not that they are always authentic. *56.1* ¶ 327. The persuasiveness of this report is debatable at best, as it is unclear that a juror would find that the average StockX customer is a "sneakerhead," or that input from a "sneakerhead" is needed to understand the straightforward language of the ads. Nevertheless, it will be up to a jury, not this Court, to decide what weight -- if any -- to give to his testimony.

In short, Nike's proposed interpretation of the ads as promising a flawless authentication process is reasonable. It may, in fact, be the only reasonable interpretation of the ads, but that's a question for the jury. The jury may accept or

reject StockX's argument that a reasonable person could understand its ads to say that StockX's authentication process exists and is effective but not flawless. I note that if the jury does find that a reasonable person might adopt StockX's interpretation, that would then mean that the ads are subject to at least two reasonable interpretations (the one put forth by Nike, which the Court has deemed reasonable as a matter of law and the one put forth by StockX). In that case, Nike's literal falsity argument would fail, and Nike would be required to show "extrinsic evidence of consumer confusion" or "evidence of the defendant's deliberate deception" to prevail on its false advertising claim. *Int'l Code Council, Inc. v. UpCodes Inc.*, 43 F.4th 46, 57 (2d Cir. 2022).

Because Nike has evidence of neither, a finding by the jury that a reasonable person could adopt StockX's interpretation of the ads would mean that Nike has failed to carry its burden as to falsity, which would mandate a verdict for StockX on that claim. *See Johnson & Johnson Vision Care, Inc. v. Ciba Vision Corp.*, 348 F. Supp. 2d 165, 184 (S.D.N.Y. 2004).

In addition to falsity, Nike must demonstrate that StockX's advertising "relates to the inherent qualities or characteristics of the goods or services in question." *Classic Liquor Importers, Ltd. v. Spirits Int'l B.V.*, 201 F. Supp. 3d 428, 450 (S.D.N.Y. 2016). This requirement is "essentially one

of materiality." *Nat'l Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

Nike argues that because StockX misrepresented the "inherent quality" of its products by falsely asserting that it sells only authentic shoes, that the statements are material. In *Apotex, Inc. v. Acorda Therapeutics, Inc.*, the Second Circuit held that its precedents "define materiality as 'likely to influence purchasing decisions.'" 823 F.3d 51, 63 (2d Cir. 2016). The plaintiff-appellant in that case -- like Nike here -- contended that because it had shown literal falsity, "consumer deception is presumed, and the court may grant relief without reference to the advertisement's actual impact on the buying public." *Id.* at 67. The Court rejected that position, reasoning that it "conflates falsity with materiality. Once literal falsity is proved, there is no requirement of extrinsic evidence showing consumer deception. But [the plaintiff] is not thereby relieved of the burden of showing materiality, which requires that the allegedly false or misleading representation involved an inherent or material quality of the product -- *i.e.*, that the representation was likely to influence purchasing decisions. *Id.* at 67-68.

Accordingly, Nike must demonstrate some probability that the ads affected consumers' purchasing decisions. While the Court thinks it's likely that Nike's arguments will be persuasive to a jury, there are questions of fact that preclude

the Court from granting summary judgment.

Nike, for its part, points to communications from StockX customers, who cited language in StockX's advertisement regarding authenticity when complaining to StockX about receiving allegedly counterfeit shoes. See *56.1 Statement* at 606 (Nike's Response). It also cites an internal "US Brand Perception Survey" by StockX, which found that 85 percent of its customers rank authenticity as "very important" or "somewhat important," suggesting that promises about authenticity are likely to affect consumer behavior. Plus, common sense would argue that users of StockX, unlike shoppers on Canal Street, are buying Nike shoes because they want Nike shoes, not shoes that look like Nikes.

StockX, meanwhile, points to a "purchase intent survey" prepared by Sarah Butler, a market research specialist retained by StockX in connection with this litigation, who found that the so-called authenticity claims did not affect buyers' self-reported purchasing intentions. *See Expert Rebuttal Report of Sarah Butler*, StockX Ex. 119, Dkt. 257-119. Although the Court is skeptical, a jury could buy her testimony.

In all events, the conflicting evidence makes it inappropriate to resolve the question of materiality on summary judgment.

Nike must also show that it was injured by StockX's

false advertising, meaning it must provide "a reasonable basis for the belief that it is likely to be damaged as a result of the false advertising." *Church & Dwight*, 843 F.3d at 72. One way Nike can satisfy its burden of proof is by proving that Nike and StockX are "competitors in a relevant market" and by proving that there is "a logical causal connection between the alleged false advertising and its own sales position." *Id.* at 71.

Nike and StockX are competitors in the sneaker market. Nike's economic expert, Dr. Jeffrey Stec, found that, between June 2022 and June 2023, StockX sold "at least 200,000 shoes that were simultaneously offered by Nike for retail sale," and that those shoes "were likely sold when these products were available for sale by Nike." *Expert Report of Jeffrey Stec*, Dkt. 309-A, at 13, 18.

StockX makes two arguments why it and Nike are not direct competitors, neither of which is persuasive. First, it notes that Nike did not list StockX as an example of a direct competitor in its SEC filings, and its witnesses did not name StockX when asked to identify their competitors during depositions. *56.1 Statement*, ¶¶ 677-78, 680, 686. But that merely shows that Nike has multiple competitors; it does not show that StockX is not one of them. Second, StockX notes that it is engaged only in the resale market, and Nike is not in that market. That distinction makes no difference, given that

StockX offered products identical to Nike's and advertised them as "new, unworn, and authentic." *56.1 Statement* at 214. In so doing, it placed StockX "obviously in competition" with Nike as a seller of new Nike products. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994).

Because Nike and StockX are direct competitors, Nike's required showing for materiality is the same as it is required showing for injury. *See Church & Dwight*, 843 F.3d at 70-71 ("While the materiality of the falsity and the likelihood of injury to the plaintiff resulting from the defendant's falsity are separate essential elements, in many cases the evidence and the findings by the court that a plaintiff has been injured or is likely to suffer injury will satisfy the materiality standard, especially where the defendant and plaintiff are competitors in the same market and the falsity of the defendant's advertising is likely to lead consumers to prefer the defendant's product over the plaintiff's"). For the same reasons that the Court cannot resolve materiality on summary judgment, it also cannot resolve injury.

Finally, Nike asks the Court to conclude that StockX's false advertising was willful. Because the Court cannot conclude that StockX engaged in false advertising, it cannot make a determination as to willfulness. In any event, as noted previously, willfulness is generally not appropriately resolved on summary judgment.

So, the parties are ordered to meet and confer regarding trial. Not later than March 14, 2025, they must submit a joint letter telling the Court how long the expected trial will be and providing three mutually-convenient dates for trial between June 15 and November 15, but not during the last week of August or the first four weeks of September.

They must also indicate whether they would like a renewed referral to their assigned magistrate judge to try to resolve the case.

And with that, anything further from Nike, Ms. Duvdevani?

MS. DUVDEVANI: No.

Thank you very much, your Honor, for your attention to this matter. I know it was a lot. Appreciate it.

THE COURT: It was a long 56.1 statement. It may win the prize of the longest 56.1 statement in the history of the Western World.

MS. DUVDEVANI: I can't disagree, your Honor, and I apologize for that.

THE COURT: Quite all right. Anything further from StockX, Ms. Bannigan?

MS. BANNIGAN: No, your Honor.

Thank you very much.

THE COURT: All right. Thank you, all.

(Adjourned)